Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lora Jean Murray a/k/a Lora Jean Baker,

Petitioner,

v.

The Inspector General.

Docket No. C-10-652

Decision No. CR2200

Date: August 3, 2010

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Lora Jean Murray a/k/a Lora Jean Baker, from participating in Medicare and other federally financed health care programs for a period of at least five years.

I. Background

Petitioner is a nurse. The I.G. determined to exclude her from participating in Medicare and other federally financed health care programs for a five-year minimum period because he found that she had been convicted of a criminal offense as is described at section 1128(a)(3) of the Social Security Act (Act). This section mandates the exclusion of any individual who is convicted of a criminal offense that occurred after August 21, 1996, consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. The parties exchanged briefs and proposed exhibits. The I.G. offered seven exhibits which he designated as I.G. Ex. 1 – I.G. Ex. 7. Petitioner offered four exhibits

which she designated as P. Ex. A – P. Ex. D. Neither Petitioner nor the I.G. requested that I conduct a hearing in person. I am receiving into evidence I.G. Ex. 1 – I.G. Ex. 7 and P. Ex. A – P. Ex. D.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues are whether:

1. Petitioner was convicted of a felony as is described at section 1128(a)(3) of the Act;

2. An exclusion of at least five years is mandated by law.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law.

1. Petitioner was convicted of a felony as is described at section 1128(a)(3) of the Act.

The following facts are undisputed. Respondent was employed at a hospital. I.G. Ex. 2 at 2; I.G. Ex. 4 at 1. During the course of her employment she diverted drugs from the hospital's pharmacy, including the controlled substances Demerol and Oxycodone, for her own personal use. *Id.*; I.G. Ex. 3 at 1. On September 24, 2008, a criminal complaint was issued against Petitioner in a Colorado State court charging Petitioner with two felony offenses: unlawful possession of a controlled substance; and possession of a controlled substance that has been obtained unlawfully. I.G. Ex. 5 at 1. Count 1 of the criminal complaint alleged specifically that:

> Between and including July 13, 2009 and July 14, 2009, . . . [Petitioner] unlawfully, feloniously, and knowingly possessed one gram or less of a material, compound, mixture, or preparation that contained Oxycodone, a schedule II controlled substance, ...

Id.

Petitioner executed a plea agreement on August 27, 2009. She agreed to plead guilty to Count 1 of the criminal complaint in return for which she received a two-year deferred judgment and sentence. I.G. Ex. 6 at 1. A sentence was imposed against Petitioner as a consequence of her guilty plea in September 2009. I.G. Ex. 7 at 1.

These facts establish Petitioner to have been convicted of a felony as is described at section 1128(a)(3) of the Act. First, they establish Petitioner to have been "convicted" of a felony. Section 1128(i) of the Act defines a conviction of an individual to include that situation:

> When the individual . . . has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Act, § 1128(i)(4). What plainly happened in Petitioner's State criminal case is that she agreed to plead guilty to a felony, Count 1 of the criminal complaint. Judgment of conviction was deferred pending her completion of her sentence. That is a "deferred adjudication" as is described by section 1128(i)(4).

Petitioner argues that she was offered, and accepted, a plea which would lead to the charges against her being dismissed if she completed the elements of her sentence including 100 hours of community service. That may be true, but it is not a defense. The premise of a deferred adjudication is that it is based on the successful performance of court-ordered activity. Here, Petitioner does no more than state the obvious, that being that she was ordered to perform various services as an element of her sentence and her deferred adjudication plea. That agreement does not change the fact that she received a deferred adjudication that meets the test of a conviction within the meaning of section 1128(i)(4).

Second, the conviction was for an offense relating to theft. The crime to which Petitioner pled guilty – unlawful possession of a controlled substance – was based on and inextricably linked to *theft* of a controlled substance. In other words, Petitioner unlawfully possessed a controlled substance as a consequence of her stealing that substance.

Finally, the conviction was for an offense that occurred in connection with the delivery of a health care item or service. Petitioner stole drugs that were part of a hospital's inventory and that had been obtained for the sole purpose of administration to patients. The crime committed by Petitioner related to the delivery of a health care item or service because the drugs would not have been available for Petitioner to steal but for her employment in a hospital and but for her access to drugs that were intended solely for the use of the hospital's patients.

2. An exclusion of at least five years is mandatory.

The I.G. is required by law to exclude any individual who is convicted of a felony that is described at section 1128(a)(3) of the Act. By law, the minimum length of a mandatory exclusion is at least five years. Act, § 1128(c)(3)(B). The I.G. excluded Petitioner for at

least five years, in other words, for the minimum mandatory exclusion period. That is reasonable as a matter of law.

/s/
Steven T. Kessel
Administrative Law Judge